In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 11 Case
MULBERRY CROSSING, INC.	)	
	)	Number 91-40466
Debtor	)	
	)	
	)	
	)	
MARY KLINE SICKEL MARILYN SICKEL SMITH and ANITA MICHELLE SULLIVAN (formerly Anita Michelle Smith)	)	
	)	
Movants	)	
	)	
	)	
	)	
v.	)	
	)	
MULBERRY CROSSING, INC.	)	
	)	
Respondent	)	

MEMORANDUM AND ORDER
ON MOTION FOR RELIEF FROM STAY

On May 15, 1991, a hearing was held upon a Motion for Relief from Stay filed by Mary Kline Sickel, Marilyn Sickel Smith, and Anita Michelle Sullivan ("Movants"). Upon consideration of the evidence adduced at trial, the briefs, appraisals, and other documentation submitted by the parties, as well as applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor filed a petition under Chapter 11 of the Bankruptcy Code with this Court on March 4, 1991. The Debtor is a small closely held corporation involved in the business of real estate development. There are no unsecured creditors in this case and only four secured creditors, three of whom, the Movants herein, are joint holders of a note and deed to secure debt in the aggregate principal amount of $998,306.00. The remaining secured debt is listed as a contingent debt in the amount of $60,000.00, "secured" by a letter of credit dated December 14, 1989, which appears to be secured by a second mortgage against the same property which secures the Movants' debt.

As of the hearing date, May 15, 1991, the Movants assert that the Debtor owes the Movants $998,306.00 principal, accrued interest of $121,437.89, and attorney's fees equal to 15% of the principal and interest due. Additional interest accrues at the rate of $273.15 per diem.

The Movants' debt arises from a contract for the sale of approximately 71 acres of land to the principals of the debtor/corporation. The principals of the Debtor pre-sold a portion of that tract to investors for enough money to pay a down payment to the Movants and return a $50,000.00 binder to the principals. At the closing on or about December 14, 1989, the principals substituted the debtor/corporation as purchaser of the

property.

The subject property at issue consists of approximately 52.42 acres located at the intersection of Highway 21, just north of Interstate 95, in Port Wentworth, Chatham County, Georgia. The property was originally purchased for purposes of commercial development but shortly after the Debtor purchased the property from the Movants, a key portion of the acreage was declared to be protected wetlands pursuant to the Federal Manual for Identifying and Delineating Jurisdictional Wetlands. Consequently, development of the acreage classified as wetlands is presently restricted. Prior to the hearing in this case, proposed revisions to the manual were published, which, if adopted, would result in at least seven key acres of the subject property no longer being classified as wetlands. At the time the Debtor purchased the property, the parties were unaware of the impact that the wetlands regulations would have on the property.

The Debtor's only scheduled assets are the remaining 52.42 acres of real estate and $80.00 in a bank account. The Debtor's only scheduled obligation other than the purchase money real estate note to the Movants is a contingent liability on a paving bond. Nothing is currently owed on that obligation.

The Movants' testimony shows a valuation of $750,000.00 for the subject property based on an anticipated use only as timberland. This limitation on usage arises from the fact that the property cannot at this point in time receive a wetlands permit from the Army Corps of Engineers for construction and further development. Accordingly, the

Movants' expert used as comparables timberland tracts largely in Chatham County, Georgia. However, none of them were zoned commercial as is the subject property nor did any of them have city utilities, water, sewer, and the like as does the subject property. The testimony from the Debtor's expert would establish a value depending on ranges which he employed of somewhere between $1.2 and $1.7 million. With the outstanding debt of somewhat under $1.2 million this would establish some degree of equity in the property. The Debtor's expert's appraisal was made based upon the assumption that the wetlands regulations would be modified to permit additional lands on the subject property to receive a wetlands permit. Indeed from a copy of a *New York Times* article dated May 15, 1991, introduced into evidence (Exhibit P-3), it does appear that three of the four relevant federal agencies with wetlands jurisdiction have agreed to a redefinition of wetlands that would free-up most of the subject property for commercial development. At this point the Department of Interior, the final agency, and the President have not approved the draft which will be subject to modification after public comment. It appears that if the wetlands problem is resolved the property has substantial equity and there is a high likelihood of the Debtor reorganizing. On the other hand, if the wetlands matter is not resolved within a reasonable time it is clear that there is no equity and no chance of reorganization.

The first annual interest payment became due in December of 1990 in the amount of some $100,000.00. It is yet unpaid. In addition there is approximately $100,000.00 of accrued interest which is as yet unpaid which puts the Debtor approximately $200,000.00 in default. The only income presently being generated by the

property is from the rental of an on-site billboard which generates approximately $5,000.00 per year. No physical improvements have been made to the property. There are apparently no means to make the second annual payment when it becomes due except for the sale of realty. Approximately 23.9 acres of the subject property are presently classified as wetlands and at present there is no way to know whether the wetlands regulations will change.

CONCLUSIONS OF LAW

The Movants have requested relief from the automatic stay under Sections 362(d)(1) and 362(d)(2), which provides such relief to creditors as follows:

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if--
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

Under Section 362(d)(2), the burden of proof is upon the moving party to show Debtor's lack of equity in the property; once the lack of equity is shown, the burden

shifts to the Debtor to prove that the property is necessary for an effective reorganization. 11 U.S.C. §362(g). *See* United Sav. Assoc. v. Timbers of Inwood Forest Assoc. Ltd., 484 U.S. 365, 375-76, 108 S.Ct. 626, 632-33, 98 L.Ed.2d 740 (1988); Matter of Sutton, 904 F.2d 327 (5th Cir. 1990).

First, to show absence of equity, the Movants need to prove the value of the collateral and show that the encumbrances against the property exceed the value. Sutton, at 329. Valuation should be determined "case-by-case, taking into account the nature of the debtor's business, market conditions, the debtor's prospects for rehabilitation, and the type of collateral." Id. at 330.

The property in this case is land bought for commercial development. Unfortunately for the Debtors, a key portion was declared wetlands and currently cannot be developed as planned. At the hearing, the Movants' expert valued the land at $750,000.00, based on its usage as timberland. The Chatham County timber tracts he used for comparison were not zoned commercial and did not have city utilities, water, and other services as does the subject property. It follows that the $750,000.00 valuation may be somewhat low; but considering that much of the property cannot be developed, the actual value may not be much higher than $750,000.00 despite the city services.

Taking into account the testimony at the hearing and the credibility of the witnesses, the Debtor's valuations of $1.2 to $1.7 million, although reasonable for property with no restrictions, are excessive for property with wetlands restrictions. Given that the

current non-contingent debt on the property is $978,306.00, without adding accrued interest, this amount substantially exceeds the expert's value of $750,000.00 by a margin of $248,306.00. Even if the actual value of the land is somewhat higher than the $750,000.00 figure, I cannot conclude that any reasonable value of the land would exceed the debt in this situation. Accordingly, I find that the Debtor lacks any equity in the property.

Upon the conclusion that Debtor lacks equity in the property, the burden shifts to the Debtor to show that the property is necessary for an effective reorganization. Timbers, 484 U.S. at 375-376. Under Section 362(d), Debtor must show that the reorganization will be effective and will occur within a reasonable time. Sutton at 330-31. The bankruptcy courts need not look into the infinite future in determining if a reorganization may occur. The court may even grant relief during the four month period in which debtor has the exclusive right to file its reorganization plan. If no realistic expectations of reorganization materialize within that period, the court should conclude that the property is not necessary for debtor's reorganization and should grant relief from the stay. Timbers 484 U.S. at 375-76.

Here, the wetlands restriction makes part of the property virtually useless for the purposes of the Debtor. The restriction is currently in place, and no one knows when Congress, the President, and the agencies involved may change the restrictions. According to the *New York Times* article entered into evidence, three of the relevant federal agencies are considering changing the wetlands restrictions, but nothing is definite.

While the elimination of these restrictions would likely result in the property having substantial equity, it would be rank speculation for me to value the property as if the wetlands problem had been resolved. The Court is faced with a difficult dilemma. The property has no equity "as is". In the absence of equity Timbers allows no basis to order the cure of pre-petition defaults or other form of adequate protection payments to the Movants as a pre-condition to Debtor being permitted the continued use and enjoyment of the property. In the absence of such payment Movants are wholly at risk. They are deprived of the property they financed but reap none of the benefits if the wetlands restrictions are eased. On the other hand, Debtor is free to hold the property in anticipation of better days but may surrender the property at no cost later on if no such development occurs. This obviously necessitates an immediate and realistic assessment of the reorganization prospects. Given the uncertainty of regulatory changes to find that there is a reasonable prospect for reorganization would require me to assume facts which, if assumed, would lead to a different conclusion about the equity issue. This I am unable to do.

The Debtor's only assets are the 52.42 acres of land and $80.00 in a bank account. With no other assets the Debtor has no chance of reorganization if relief from stay is granted. Although this situation is unfortunate, the ultimate question is whether there is any possibility of a reorganization if the property is retained. Currently Debtor owes $998,306.00 to the Movants, plus accrued interest of $121,437.89, with additional interest accruing at the rate of $273.15 per diem. Debtor is unable to service its debt at current land values. The Movants should not be deprived of the use and enjoyment of

their land merely upon the possibility of regulatory change which would doubtless enhance land values but which may never materialize. Over four months have passed since Debtor filed for Chapter 11. Its chances of reorganization have not improved. Therefore, I find that the property is not necessary for an effective reorganization, as such a reorganization has not occurred and, based on the evidence, cannot occur within a reasonable time.

I conclude that the requirements of Section 362(d)(2) have been met entitling the Movants to relief from the automatic stay.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motion for Relief from Stay filed by Mary Kline Sickel, Marilyn Sickel Smith, and Anita Michelle Sullivan is granted.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of July, 1991.